

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA	*	CIVIL ACTION
	*	
versus	*	12-1924
	*	
THE CITY OF NEW ORLEANS	*	SECTION “E”
	*	
	*	MAGISTRATE DIVISION “2”
	*	

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

MAY IT PLEASE THE COURT:

Now into Court comes the Office of the Independent Police Monitor and Susan Hutson, individually and in her official capacity as the Independent Police Monitor (IPM) for the City of New Orleans. Pursuant to Federal Rule of Civil Procedure 24(a)(2), we move to file as a matter of right an Intervening Complaint in the above captioned civil action. Intervenors have an interest in the subject of this civil action. The Court’s acceptance of the July 24, 2012 Consent Decree to dispose of this civil action will impair or impede the Independent Police Monitor in the performance of its mandated functions. Intervenors are not adequately represented by the parties to this civil action. Therefore, we move this Court to permit the IPM and OIPM to intervene in this civil action in order to permit the OIPM to fully participate in the creation of any Consent Decree that may be entered into herein and define its duties and rights thereunder..

HISTORY OF OIPM

The Office of the Independent Police Monitor (OIPM) is a division of the Office of Inspector General for the City of New Orleans. It was created in 2008, when the vast majority, 77%, of the people of New Orleans voted to amend the Home Rule Charter¹ to include the Independent Police Monitor as a division of the Office of Inspector General. An ordinance² was then passed which created and defined the role of the Independent Police Monitor (City Code Sec. 2-1121). The mission of the New Orleans OIPM is to ensure the New Orleans Police Department's (NOPD) accountability, transparency, and responsiveness to the community it serves.

The vision of the OIPM is to improve police service to the community, citizen trust in the NOPD, and officer safety and working conditions. The Police Monitor has a number of broad responsibilities. These broad responsibilities include ensuring that all concerns regarding police misconduct are classified and investigated at the appropriate level and that those investigations are fairly, timely and thoroughly handled; to make information about this review process available to the public; to carefully consider aggregate data from complaints, investigations, community concerns and public policy while crafting recommendations aimed toward improving the quality services of the NOPD; and to reach out to inform the community about the complaint process and OIPM activities, and to listen and respond to broader community concerns.

Neither of the current parties to this civil action adequately represents the interests which the Office of the Independent Police Monitor was created to serve. The OIPM's motion to intervene meets all of the mandates of Rule 24(a)(2) for intervention as a matter of right. (1) The Motion to Intervene is timely; (2) the rights at stake are directly implicated by the wording of the

¹ Home Rule Charter, City of New Orleans, Sec. 9-401.

² Code of Ordinances, City of New Orleans, Sec. 2-1121.

proposed Consent Decree; (3) Intervenors cannot effectively protect their interests unless added to this suit; and, neither the United States of America (“USA”), its Department of Justice (“DOJ”) or the City of New Orleans (“City”) adequately represents the OIPM. The parties have negotiated the proposed Consent Decree which has a direct effect on the OIPM without including the OIPM in any aspect of the negotiation. The OIPM and IPM have the right to intervene in the above captioned suit and seeks intervention in this civil action as a matter of right. In the alternative, Intervenors request that this Honorable Court grant them permissive intervention.

CONSENT DECREE NEGOTIATION

The OIPM has made several requests of the City of New Orleans to be directly involved with the negotiation of the proposed decree. The OIPM has met with both the DOJ and the City of New Orleans to discuss the duties the OIPM should have within the consent decree, in respecting the unique role the OIPM plays as the local monitor created by the popular will of the people of New Orleans. Despite meeting with both parties numerous times, the IPM is barely mentioned in the Consent Decree. The IPM is mentioned in less than 15 paragraphs out of the total 492 paragraphs of the consent decree.

The OIPM has been in contact with both the DOJ and the City of New Orleans since the DOJ first came to New Orleans in May of 2010. The OIPM has on numerous occasions provided both parties with the OIPM’s observations and opinions on necessary reform measures. In particular, once the parties started discussing negotiating a settlement, the OIPM reached out to the Mayor on at least three occasions prior to the signing of this Consent Decree, including August 23, 2011, June 6, 2012, and June 11, 2012. Additionally, the OIPM was scheduled to

meet with the Mayor again on July 17, 2012 to specifically discuss the OIPM's role in the Consent Decree, but the Mayor asked to reschedule the meeting. However, the meeting was not rescheduled, and instead on July 24, 2012; the City Attorney advised the OIPM that an agreement had been reached.

On each occasions the OIPM requested to be present during negotiations or to receive a copy of any drafts of the Consent Decree. The OIPM reiterated on each occasion that it needed to see its role set out in the Consent Decree prior to the City reaching an agreement. On each occasion, the OIPM was assured by the Mayor, that although the OIPM would not be a party to the negotiations, the OIPM would receive drafts for its review, especially as it related to its role. Therefore, the OIPM met with the City Attorney or his staff on at least seven occasions in 2011 and 2012, including October 14, 2011, December 2, 2011, December 13, 2011, December 19, 2011, March 6, 2012 and during an impromptu meeting on May 1, 2012, to follow up about the OIPM's role. However, the Consent Decree, which the OIPM was never allowed to review, takes into account very little of the input provided by the OIPM, yet purports to bind the OIPM to its terms and conditions.

ARGUMENT

I. INTERVENTION IS PROPER AS A MATTER OF RIGHT.

Intervenors request intervention as a matter of right under Federal Rule of Civil Procedure 24(a) (2), which provides, in pertinent part, as follows: (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical

matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. Intervention as of right should be granted when the following four requirements are met: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996). Intervention as a matter of right involves a "flexible" inquiry "which focuses on the particular facts and circumstances surrounding each application [for intervention]." *Edwards, supra*. Accordingly, "intervention of right must be measured by a practical rather than technical yardstick. *Id.* Intervenor meets all four requirements.

A. THE INTERVENTION IS TIMELY

The Motion to Intervene has been timely filed, as it is filed within the deadline established by this Court in its Order of July 31, 2012 (Record Document 7).

B. INTERVENORS HAVE A DIRECT, SUBSTANTIAL AND LEGALLY PROTECTABLE INTEREST IN THIS CIVIL ACTION THAT THEY CANNOT PROTECT WITHOUT BEING A PARTY TO THIS SUIT AND WHICH IS NOT ADEQUATELY PROTECTED BY ANY OF THE OTHER PARTIES.

Intervenors have a direct, substantial and legally protectable interest that the law recognizes as belonging to them. *Edwards, supra*, at 1004. "[T]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is

compatible with efficiency and due process.” *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204, n.10 (5th Cir. 1992); *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994). The duties of the OIPM under its city ordinance and the MOU are often duplicated in the federal Consent Decree, but the OIPM is not offered any access to any information or assurances that the NOPD or the federal monitor will confer and share information or access with the OIPM. The OIPM is affected by almost every part of the proposed Consent Decree which regulates almost everything that the OIPM is required to do, from monitoring the effectiveness of training to reviewing officer-involved incidents.

The IPM and the OIPM intervene both on their own behalves, but also on behalf the community that has helped to create this office. Specifically, the OIPM has attached two affidavits from community members, Yvette Thierry from the Safe Streets, Safe Communities group (Safe Streets) and Norris Henderson also a member of Voice of the Ex-Offender (VOTE) as well as Safe Streets, Safe Communities whose work was integral to the creation of the OIPM. Safe Streets is a community-based organization that campaigns for a new criminal justice system in New Orleans, one that creates Safe Streets and strong communities for everyone, regardless of race or economic status. Safe Streets envisions a system that: Keeps people safe from all forms of violence and crime including street violence, domestic violence, and law enforcement violence; is transparent, democratic, fair and accountable to the community it serves; and supports community-driven responses to crime that are based in best practices.

In October of 2006, a Safe Streets survey of over 500 community members found that 71% of African Americans live in daily fear that police will harm them or a loved one. Safe Streets has made significant progress generating community support, building a strong reform coalition, re-framing the media debate and effecting policy change. One of their most significant

accomplishments includes securing a city council resolution and funding to launch the OIPM. Safe Streets supported the creation of the OIPM as a completely separate agency – separate from the NOPD, the City Council and the Mayor’s Office. From Safe Streets’ perspective, the separation and independence of the OIPM is integral, if the citizens of New Orleans are to gain greater transparency of the NOPD, and better identify obstacles to public safety and solutions to violence, corruption, and a small number of rogue police officers ruining the reputation of the entire force and the confidence of the entire community.

Safe Streets is specifically dissatisfied with the consent decree and the role relegated to the OIPM in the Consent Decree. The IPM was selected under a process by which the public was allowed to vet and review all IPM candidates. The OIPM is the community’s representative when dealing with the NOPD. Safe Streets is also specifically concerned that there is no requirement in the New Orleans Consent Decree that the OIPM have access to the same information being provided to the consent decree monitor. They believe that if the OIPM does not have a strong role in the Consent Decree, it will be business as usual for the NOPD with the public being kept in the dark.

Also attached is an affidavit in support from Philip K. Eure, the Executive Director of Office of Police Complaints (OPC) in Washington, D.C., who provided information about how his civilian police oversight agency was involved in the negotiated settlement of a similar action against the Metropolitan Police Department.

C. INTERVENORS ARE SO SITUATED THAT THE DISPOSITION OF THIS CIVIL ACTION MAY, AS A PRACTICAL MATTER, IMPAIR OR IMPEDE THE ABILITY TO PROTECT THEIR INTEREST.

The fact remains that this proposed Consent Decree is binding, not only on the USA and the City which are parties to it, but on the OIPM itself. The proposed Consent Decree is, by its terms, binding on not only on the parties, but on their “...officials, agents, *employees*, and successors.” (Rec Doc 2-1, page 108, paragraph 443). The Office of the Independent Police Monitor is a city agency by virtue of its status as a division within the office of the Inspector General’s office. As a city agency, the OIPM would be bound under the proposed consent decree. On the occasion the OIPM reorganizes it mandates either internally or through referendum, it is required to incorporate the consent decree into its functions. The Proposed Consent Decree provides, “If the City establishes or reorganizes a government agency or entity whose function includes overseeing, regulating, accrediting, investigating, or otherwise reviewing the operations of the NOPD or any aspect thereof, the City agrees to ensure these functions and entities are consistent with the terms of this agreement and shall incorporate the terms of this agreement into the oversight, regulatory, accreditation, investigation, or review functions of the government agency or entity as necessary to ensure consistency. (Record Document 2-1, page 3, paragraph 8, emphasis added).

The OIPM is required by the City of New Orleans and thus the people of New Orleans by overwhelming majority to monitor to its best ability the New Orleans Police Department. Specifically, the subject areas which the OIPM is required to monitor includes but is not limited to: civilian and internally-generated complaints; internal investigations; discipline; use of force; and in-custody deaths, the numbers and types of complaints; the quality and timeliness of New Orleans Police Department investigations; the adequacy of data collection and analysis; the public integrity bureau’s policies, the public integrity bureau’s procedures, and the public integrity bureau’s resource needs; risk management reviews; the operations and effectiveness of

New Orleans Police Department “early warning system”; supervision, training, and discipline; pattern analysis; and other tasks to ensure New Orleans Police Department accountability, transparency, and responsiveness to the community it serves. The proposed decree mentions and implicates each and every function the OIPM is mandated to perform and heightens the standards which NOPD must meet in each and every category. The OIPM’s mandate will continue regardless of the presence of the federal monitor. However, by explicitly deleting any reference of the OIPM in informational access and participation, the Consent Decree makes the OIPM’s function all but impossible to perform.

Under the current terms of the Consent Decree, the OIPM is required to meet with the federal monitor but there is no reciprocal obligation on the part of the federal monitor or the NOPD to meet with the NOPD. Specifically, the decree states “the IPM **will** coordinate with the monitor and NOPD to minimize duplication of efforts, recognizing that overlapping or redundant audits may be necessary on occasion to assess the quality and reliability of various internal and external oversight mechanisms.” (Rec Doc 2-1, p.108, pgh 443).

Furthermore, the Federal Monitor and the NOPD are free to use the information and the data which the IPM has collected, although the NOPD and the federal monitor does not need the IPM’s consent to do so nor is there a requirement to confer with the IPM before demanding such information. “In conducting these outcome assessments the monitor **may** use any relevant data collected and maintained by the NOPD (e.g. crime trend pattern analysis), the Office of the Inspector General, or the IPM, provided that it has determined, and the parties agree, that this data is reasonably reliable and complete.” (Doc. 2-1, p. 112, pgh 449). By allowing, the federal monitor full access to the OIPM’s information while not requiring the federal monitor to meet with the OIPM or to share its information or access, the consent decree creates a two tier system,

by which a federal monitor may take the OIPM's information but is not obligated to coordinate, confer or share information. Furthermore, because the federal monitor is not required under the consent decree to share information or confer with the OIPM on any of the new responsibilities the NOPD is required to perform, the monitor is specifically forbidden (by an all purpose provision) from making any disclosures to the OIPM of pertinent information. "Except as required or authorized by the terms of this agreement or the parties acting together, the monitor may not... disclose non-public information provided to the monitor pursuant to this agreement." (Rec Doc 2-1, p. 115, pgh 462). . Due to the proposed decree's failure to include the OIPM in any informational access or any requirement of the monitor to include the OIPM in meetings with the NOPD, the proposed decree has made the OIPM's required duties under its city ordinance all but impossible to perform.

The proposed Consent Decree sets forth numerous NOPD mandates that directly affect the operations of the Office of the Independent Monitor. The New Orleans Police Department is required to integrate new training mandates through a Training Advisory Board. The training advisory board includes members of the NOPD, in addition to the FBI, the District attorney's Office, the USAO and the City Attorney's Office. This board will be specifically monitored by the federal monitor. (Rec Doc 2-1, p. 65 pgh 248). The OIPM has not been given any involvement on this board or in monitoring this board. The New Orleans Police Department is required to deliberate over Use of Force Incidents through a new Use of Force Review Board. The federal monitor will directly monitor the Use of Force Review Board. (Rec Doc 2-1, p. 32, pgh 105). Monitoring Use of Force Incidents however, is a direct mandate of the OIPM. Again, the OIPM is not specifically given any access to this new board, in the Consent Decree, but the OIPM is required to fully evaluate all information relating to Use of Force Incidents.

Finally, it should be noted that although the OIPM is a part of the city, by virtue of its position in the Office of the Inspector General, the OIPM was specifically created to be operationally independent from the legislative and executive branches of the city government. Operationally independent is defined as "not prevented, impaired, or prohibited from initiating, carrying out, or completing any audit, investigation, inspection or performance review." City Code Sec. 2-1120, Paragraph 6 (b). Thus, where the city attempts to bind or deny access to the OIPM, it cannot do if such a binding agreement will prevent, impair, or prohibit the OIPM from performing its mandate.

If the OIPM is denied the right to intervene the IPM may be precluded from raising any subsequent challenge to the decree, on its own behalf or on behalf of the community it represents, once the decree is implemented and its effects fully realized, which is clearly prejudicial to Intervenor. *Edwards, supra*, at 1002. Under these circumstances, the third prong of the test is clearly satisfied. *Sierra Club v. Glickman, supra*; *Sierra Club v. Espy, supra*, at 1207; *Edwards, supra*, at 1004-5.

D. THE IPM'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY THE OTHER PARTIES.

Intervenor submit that neither the USA nor the City adequately represent their interests. The necessary showing to establish inadequate representation was set forth by the Fifth Circuit in *Sierra Club v. Espy, supra*, at 1207: The final requirement for intervention as a matter of right is that the applicant's interest must be inadequately represented by the existing parties to the suit. The applicant has the burden of demonstrating inadequate representation, but this burden is

“minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636, 30 L.Ed.2d 686 (1972). The applicant need only show that representation “may be” inadequate. *Id.*

The City was approached numerous times by the OIPM, and respectfully requested to be made part of the consent decree both in duties, as well as through collaboration. The OIPM has been denied any monitoring duties in the consent decree, denied any resources in the consent decree and has been shut out of any future collaboration between the federal monitor and the NOPD. This is evident by the vast omission of the OIPM within the consent decree. The DOJ was approached numerous times by the OIPM, and respectfully requested to be made part of the consent decree both in duties as well as through collaboration, however they were unable to assist the OIPM. The OIPM has been denied any monitoring duties in the consent decree, denied any resources in the consent decree and has been shut out of any future collaboration between the federal monitor and the NOPD, by the vast omission of the OIPM within the consent decree. The interests of the USA and the City are adverse to the Intervenor. As such, they cannot be said to “adequately represent” the interests of Intervenor. *Edwards, supra*. Intervenor must be allowed to intervene to protect their interests, as no other party has done so.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION SHOULD BE ALLOWED.

In the alternative, Intervenor satisfy the requirements for this Court to permit intervention. Permissive intervention, which is a within the Court’s discretion, is appropriate when the intervention request is timely, the intervenor’s “claim or defense and the main action have a question of law or fact in common,” and granting the request for intervention will not unduly delay or prejudice the original parties in the case. Federal Rule of Civil Procedure 24(b)(2); *Edwards, supra*, at 999; *Kneeland v. Nat’l Collegiate Athletic Ass’n*, 806 F.2d 1285,

1289 (5th Cir. 1987). As discussed above, Intervenor's request for intervention is timely. The requirement for permissive intervention, that "an applicant's claim or defense and the main action have a question of law or fact in common," is likewise readily satisfied in these circumstances. FED. R. CIV. P. 24(b)(2). The proposed Consent Decree directly impacts the basis for Intervenor's claims, *i.e.*, their duties to the people of New Orleans. Finally, given the timeliness of this Motion, as discussed above, neither the USA nor the City will be unduly prejudiced. Accordingly, if this Honorable Court does not grant intervention as a matter of right, it should grant Intervenor's request for permissive intervention.

CONCLUSION

For the above and foregoing reasons, we move this Court to grant intervention as a matter of right. In the alternative, should this Court not grant an intervention of right, we move this Court to grant permissive intervention.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of August, 2012 I served the the foregoing on to all counsel of record by electronic mail and certified mail.

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